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8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal Case No. 08CR0509-BEN
)	
11 Plaintiff,	)	DATE: April 21, 2008
	)	TIME: 2:00 p.m.
12 v.)	
	)	GOVERNMENT'S RESPONSE AND
13 ISABEL QUISTIAN, III,	)	OPPOSITION TO DEFENDANT'S
	)	MOTIONS TO:
14 Defendant.	)	(1) COMPEL DISCOVERY; AND
	)	(2) GRANT LEAVE TO FILE FURTHER
	)	MOTIONS
	)	TOGETHER WITH STATEMENT OF FACTS,
16	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES AND THE GOVERNMENT'S
17	)	MOTION TO:
18	)	(1) PRODUCE RECIPROCAL DISCOVERY

19 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
 20 Karen P. Hewitt, United States Attorney, and Timothy F. Salel, Assistant United States Attorney, and
 21 hereby files its response and opposition to the above-referenced motions.

22 As discussed further, the Government will comply with all discovery obligations -- including
 23 those governed by Rule 16 of the Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. §
 24 3500), and Brady v. Maryland, 373 U.S. 83 (1963) -- and anticipates that most, if not all, discovery
 25 issues can be resolved amicably and informally. The Government has no objection to the Court granting
 26 leave to file further motions based on new information and requests reciprocal discovery.
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I

STATEMENT OF FACTS

On February 22, 2007, Defendant ISABEL QUISTIAN, III was indicted by a federal grand jury and charged in Criminal Case No. 08CR0509-BEN with conspiracy to distribute hydrocodone bitartrate and oxycodone in violation of 21 U.S.C. §§ 841(a)(1) and 846, and possession of hydrocodone bitartrate and oxycodone with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Defendant pled not guilty to all charges in the Indictment and the Government is in the process of complying with its discovery obligations in this case and other related cases.

II

COMPEL DISCOVERY**(A) Defendant's Statements**

The Government recognizes its obligation under Rules^{1/} 16(a)(1)(A) and 16(a)(1)(B) to provide to Defendant the substance of Defendant's oral statements and Defendant's written statements. This includes all recorded statements made by Defendant. If the Government discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be promptly provided to Defendant.

(B) Brady Material

The Government will perform its duty under Brady to disclose material exculpatory information or evidence favorable to Defendant when such evidence is material to guilt or punishment. The Government recognizes that its obligation under Brady covers not only exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on behalf of the United States. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667, 676-77 (1985). This obligation also extends to evidence that was not requested by the defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107-10 (1976). "Evidence is material, and must be disclosed (pursuant to Brady), 'if there is a reasonable probability that, had the evidence been disclosed to the

^{1/} Unless otherwise noted, all references to "Rules" refers to the Federal Rules of Criminal Procedure.

1 defense, the result of the proceeding would have been different.” Carriger v. Stewart, 132 F.3d 463,
 2 479 (9th Cir. 1997) (en banc). The final determination of materiality is based on the “suppressed
 3 evidence considered collectively, not item by item.” Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

4 Brady does not, however, mandate that the Government open all of its files for discovery. See
 5 United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000)(per curiam). Under Brady, the
 6 Government is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see
 7 United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002); (2) evidence available to the defendant from
 8 other sources (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the
 9 defendant already possesses (see United States v. Mikaelian, 168 F.3d 380-389-90 (9th Cir. 1999)
 10 amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the undersigned Assistant U.S.
 11 Attorney could not reasonably be imputed to have knowledge or control over. See United States v.
 12 Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001). Brady does not require the Government “to create
 13 exculpatory evidence that does not exist,” United States v. Sukumolahan, 610 F.2d 685, 687 (9th Cir.
 14 1980), but only requires that the Government “supply a defendant with exculpatory information of
 15 which it is aware.” United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976).

16 **(C) Prior Record and Other Bad Acts**

17 To the extent that the United States determines that there are any documents reflecting
 18 Defendant’s prior criminal record, the United States will provide those documents to Defendant in
 19 accordance with Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129 (9th Cir. 1990).

20 The Government will also disclose in advance of trial, the general nature of any “other bad acts”
 21 evidence that the United States intends to introduce at trial pursuant to Fed. R. Evid. 404(b). However,
 22 the Government notes that evidence should not be treated as “other bad acts” evidence under Fed. R.
 23 Evid. 404(b) when the evidence concerning the other bad acts and the evidence concerning the crime
 24 charged are “inextricably intertwined.” See United States v. Soliman, 812 F.2d 277, 279 (9th Cir.
 25 1987).

26 **(D) Evidence Seized**

27 The Government will comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon
 28 reasonable notice, to examine, inspect, and copy all documents and tangible objects seized that is within

1 its possession, custody, or control, and that is either material to the preparation of Defendant's defense,
 2 or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained
 3 from or belongs to Defendant.

4 **(E) Statements Relevant to the Defendant**

5 The Government will provide all statements relevant to Defendant as required by Rule 16,
 6 Brady, and Jencks. The Government is not required, however, to produce all possible information and
 7 evidence regarding any speculative defense claimed by Defendant. Wood v. Bartholomew, 516 U.S.
 8 1, 6-8 (1995) (per curiam) (holding that inadmissible materials that are not likely to lead to the discovery
 9 of admissible exculpatory evidence are not subject to disclosure under Brady).

10 **(F) Jencks Act Material**

11 Rule 26.2 incorporates the Jencks Act, 18 U.S.C. § 3500, into the Federal Rules of Criminal
 12 Procedure. The Jencks Act requires that, after a Government witness has testified on direct examination,
 13 the Government must give the Defendant any "statement" (as defined by the Jencks Act) in the
 14 Government's possession that was made by the witness relating to the subject matter to which the
 15 witness testified. 18 U.S.C. § 3500(b). For purposes of the Jencks Act, a "statement" is (1) a written
 16 statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially
 17 verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement
 18 by the witness before a grand jury. 18 U.S.C. § 3500(e). If notes are read back to a witness to see
 19 whether or not the government agent correctly understood what the witness was saying, that act
 20 constitutes "adoption by the witness" for purposes of the Jencks Act. United States v. Boshell, 952 F.2d
 21 1101, 1105 (9th Cir. 1991)(citing Goldberg v. United States, 425 U.S. 94, 98 (1976)).

22 **(G) Raw Notes**

23 The Government has no objection to the preservation of any handwritten notes taken by any of
 24 the agents. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must preserve their
 25 notes of interviews of an accused or prospective government witnesses). However, the Government
 26 objects to providing Defendant with a copy of any rough notes at this time. Rule 16(a)(1)(A) does not
 27 require disclosure of rough notes where the content of those notes have been accurately reflected in a
 28 type-written report. See United States v. Brown, 303 F.3d 582, 590 (5th Cir. 2002); United States v.

1 Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require disclosure of an agent's notes
2 even where there are "minor discrepancies" between the notes and a report). The Government is not
3 required to produce rough notes pursuant to the Jencks Act, because the notes do not constitute
4 "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially
5 verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness.
6 United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). It is unclear whether any rough notes
7 in this case constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez,
8 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where
9 notes were scattered and all the information contained in the notes was available in other forms). Any
10 notes would not be Brady material if the notes do not present any material exculpatory information, or
11 any evidence favorable to Defendant that is material to guilt or punishment. Brown, 303 F.3d at 595-96
12 (rough notes were not Brady material because the notes were neither favorable to the defense nor
13 material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994)
14 (mere speculation that agents' rough notes contained Brady evidence was insufficient). If the
15 Government determines that the rough notes are discoverable under Rule 16, the Jencks Act, or Brady,
16 the rough notes will be provided to Defendant.

17 IV

18 LEAVE TO FILE FURTHER MOTIONS

19 The Government does not object to the granting of leave to allow Defendant file further motions
20 as long as the additional motions are based on newly discovered evidence or discovery provided by the
21 Government subsequent to the instant motion at issue.
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V

GOVERNMENT'S MOTION TO COMPEL RECIPROCAL DISCOVERY**A. All Evidence That Defendant Intends To Introduce In His Case-In-Chief**

Since the Government will honor Defendant's requests for disclosure under Rule 16(a)(1)(E), the Government is entitled to reciprocal discovery under Rule 16(b)(1). Pursuant to Rule 16(b)(1), requests that Defendant permit the Government to inspect, copy and photograph any and all books, papers, documents, photographs, tangible objects, or make copies or portions thereof, which are within the possession, custody, or control of Defendant and which Defendant intends to introduce as evidence in his case-in-chief at trial.

The Government further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession and control of Defendant, which he intends to introduce as evidence-in-chief at the trial, or which were prepared by a witness whom he intends to call as a witness. The Government also requests that the Court make such order as it deems necessary under Rules 16(d)(1) and (2) to ensure that the Government receives the reciprocal discovery to which it is entitled.

B. Reciprocal Jencks – Statements By Defense Witnesses

Rule 26.2 provides for the reciprocal production of Jencks material. Rule 26.2 requires production of the prior statements of all witnesses, except a statement made by a defendant. The time frame established by Rule 26.2 requires the statements to be provided to the Government after the witness has testified. However, to expedite trial proceedings, the Government hereby requests that Defendant be ordered to provide all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. Such an order should include any form in which these statements are memorialized, including but not limited to, tape recordings, handwritten or typed notes and reports.

VI

CONCLUSION

For the reasons stated herein, the Government respectfully requests that this Court deny Defendant's motions to compel production of discovery and grant leave to file further motions, except where unopposed, and grant the Government's motions to compel production of reciprocal discovery.

Dated: April 16, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ TIMOTHY F. SALEL
TIMOTHY F. SALEL
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08CR0509-BEN
Plaintiff,)
v.) CERTIFICATE OF SERVICE
ISABEL QUISTIAN, III,)
Defendants.)

IT IS HEREBY CERTIFIED that:

I, Timothy F. Salel, am a citizen of the United States over the age of 18 years and a resident of San Diego County, CA; my business address is 880 Front Street, San Diego, CA 92101-8893; I am not a party to the above-entitled action.

I have caused service of **Government's Response and Opposition To Defendant's Motions To Compel Production of Discovery and To Grant Leave To File Further Motions**, on the following party, by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies the following parties at the following e-mail addresses:

Richard B. Rodriguez, Esq. @ lawrichrod@aol.com

I declare under penalty of perjury that the foregoing is true and correct.

Executed: April 16, 2008

/s/ TIMOTHY F. SALEL
TIMOTHY F. SALEL
Assistant U.S. Attorney
E-mail: timothy.salel@usdoj.gov